IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 372

PAUL GINSBURG, Petitioner

v.

HON. PHILIP L. SULLIVAN, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, and HON. ROY H. JOHNSON, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division

On Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION TO CONSOLIDATE WITH PROCEEDINGS AT NO. 788 OCTOBER TERM, 1956, AND TO REMAND

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully moves this Honorable Court:

To vacate all of its Orders entered herein and to vacate all of its Orders entered in his companion proceeding in this Court against John D. Black, et al., at No. 788 October Term, 1956 (*United States of America, Petitioner, v. The Ohio Power Company*, 353 U.S. 98, 1957);

Then to consolidate that proceeding with this one, and grant the consolidated petitions for writ of certiorari;

And thereupon to remand (*United States of America, Petitioner, v. Shotwell Manufacturing Company, Harold E. Sullivan, et al.*, 355 U. S. 233, 1957, citing and relying upon *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, and *Mesarosh v. United States*, 352 U. S. 1) the consolidated proceedings to the District Court at No. 54C681 for trial on the pleadings filed therein as well as the Amendment to the Complaint (App. 11);

And in support hereof avers:

1. On December 15, 1958, the Petition for Rehearing was denied by this Honorable Court.

2. On December 31, 1958, since said denial of rehearing, a decision was entered in the Court of Appeals for the Third Circuit which conflicts with the decision of the Seventh Circuit sought to be reviewed herein. Mr. Justice Harlan, in advising lawyers on certiorari in a lecture delivered this month before the Association of the Bar of the City of New York, suggested that the surest way to get a petition for a writ of certiorari granted is to show that the case turns on an issue of federal law as to which there is a conflict of decisions among the lower federal courts.

3. The said decision in the Third Circuit, as yet unreported, is at No. 12,777 in the appeal of *Ada J. Vant and Walter J. Vant, Appellants, v. The Mutual Benefit Life Insurance Company*,—F. 2d—, and the entire Per Curiam Opinion of the Court therein is as follows:

> "When this matter came before us for hearing on appellee's motion to dismiss the appeal and the

countering motion of appellants to remand with instructions, it became apparent that counsel for both parties were addressing themselves, in substantial part at least, to the merits of the issue presented by the appeal. Accordingly, it was stipulated in open court that at the conclusion of argument the case should stand submitted on the merits of the appeal as well as on the motions. In this connection counsel for appellant strongly urged the relevancy of briefs and records on the prior appeal on this case. *Vant v. Mutual Benefit Life Ins. Co.*, 1958, 255 F.2d 263. We have examined and considered these items.

"This litigation is an effort of a widow and her son, beneficiaries of a policy of insurance on the life of their deceased husband and father, to obtain immediate payment of the entire proceeds of this life insurance policy, although the policy itself expressly provided for the payment of interest on the principal sum to the widow during her lifetime and the entire proceeds to the son on her death. Originally, the case was submitted in the trial court on plaintiffs' motion for summary judgment and defendant's motion to dismiss. Final judgment was entered dismissing the complaint. On appeal we affirmed.

"After our remand to the district court the plaintiffs filed an amendment to their original complaint alleging in substance that the defendant is in legal contemplation a trustee of the fund in controversy for the plaintiffs. This theory was not spelled out in the original complaint. Believing that our appellate ruling required the same result

whether the complaint presented a contractual or a trust theory of liability, the district court, on motion, struck this amendment. This appeal followed.

"The district court was correct in its interpretation of the meaning and effect of our decision on the first appeal. It was and is our view that appellants have not alleged or shown justification, whether on a theory of trust or otherwise, for equitable intervention overriding the arrangement made by the insured with the insurance company for the deferment of payment of the proceeds of the insurance policy.

"The motions will be denied and the judgment will be affirmed."

4. In the said case of *Vant v. Mutual, supra*, the identical procedural issue was before the Court as in the instant case. The issue is whether or not, after judgment for defendant on motion and affirmance by the Court of Appeals, the case can proceed further in the District Court by amendment as permitted by the Rules and applicable law. In both cases, the instant case and the *Vant* case, the amendment conformed the Complaint to the Opinion of the Court of Appeals. In the *Vant* case, the Court of Appeals for the Third Circuit decided that the case could proceed further in the District Court procedurally, and then gave consideration to the second appeal on the merits and in connection therewith even "examined and considered" the "briefs and records on the prior appeal". Therein, the appellee's motion to dismiss the appeal for being frivolous and without merit was itself denied, the second appeal obviously being from an appealable Order. Although counsel for the appellee

in the *Vant* case cited. Third Circuit cases in "support" of its insupportable proposition, counsel for the appellants successfully cited the same cases contrariwise. For instance, *Carpenter v. Rohm & Haas Co., Inc.*, 3rd Cir., 1950, 180 F.2d 749, affirming D.C. Del., 9 F. R. D. 535; citing with approval *Maddrix v. Dize*, 61 F. Supp. 946, held that a mandate from a reviewing court is controlling only as to such matters as are within the compass of such mandate, and that the lower court is still free to act as to questions not within the compass of the mandate. Also, in opposition to the notion that there can be only one appeal or mandate to a case, *Butcher & Sherrerd v. Welsh*, 3rd Cir., 1953, 206 F.2d 259, was a mandamus proceeding to vacate an order granting a new trial and further proceedings after that Court had returned three mandates affirming judgment against the defendant, the successful advocate therein being Hon. W. Wilson White, now Assistant Attorney General of the United States in charge of the Civil Rights Division.

5. In the instant case, respondent District Judge Sullivan refused the entry of Orders upon petitioner's Amendment to the Complaint (App. 11) and Motion for Change of Venue (App. 23-24) and even the filing of them, following opposing counsel's misrepresentation that "there is nothing before the Court" (App. 29); and then said jurist stated from the bench, "No order on both motions; no jurisdiction" (App. 29). The Court of Appeals for the Seventh Circuit sanctioned these departures of respondent District Judge Sullivan from the accepted and usual course of judicial proceedings. Patently, the conflict in this case with the decision in the *Vant* case is too obvious to require comment. Furthermore, there

can be no question that the decisions sought to be reviewed herein are not only unconstitutional and otherwise illegal, but also the seed for a dangerous precedent; as distinguished from the decision in the *Vant* case which undoubtedly reaffirms and pronounces the Law of the Land.

6. This Honorable Court is aware of the fact that the "decisions" of the respondent District Judge were unaccompanied by an Opinion, and that no authority therefor was stated from the bench; and further no reasons were given by the Court of Appeals for its failure to exercise its supervisory powers.

7. This proceeding is an outgrowth of the prior one at No. 788 October Term, 1956, and consolidation of the two for remand to the District Court is logical, and necessary to prevent a deprivation of petitioner's federal constitutional and civil rights. It is apparent that petitioner has been denied his right to be heard in advance of judgment.

8. So far as the conflict alleged above is concerned, it should unquestionably be resolved against the unconstitutional and otherwise unlawful decision of the Seventh Circuit involved herein, and in favor of the Third Circuit decision in the *Vant* case which reaffirms and pronounces the Law of the Land.

Wherefore, it is respectfully submitted that the prior proceeding of your petitioner against John D. Black, et al., at No. 788 October Term, 1956, should be consolidated with this proceeding for purposes of remand to the District Court for trial.

PAUL GINSBURG,

Dated: 19 January 1959. Counsel for Petitioner.